IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

C.R.P.PD.Nos.1445 & 1726 of 2004
and
C.M.P.No.13581 of 2004
in
C.R.P.PD.No.1445 of 2004
&
C.M.P.No.16223 of 2004
in
C.R.P.PD.No.1726 of 2004

Jayamani ... Petitioner in C.R.P.No.1445/2004 [Plaintiff]
Amsaveni ... Petitioner in C.R.P.No.1726/2004 [Plaintiff]

Vs.

1. The District Collector,
   Coimbatore District,
   Collectorate Compound,
   Coimbatore.

2. The Tahasildhar,
   Pollachi Taluk,
   Pollachi,
   Coimbatore District.

3. T.Swaminathan

... Respondents in both C.R.Ps.[Defendants].

PRAYER IN C.R.P.PD.No.1445 of 2004 : Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 09.07.2004 and made in I.A.No.173 of 2004 in O.S.No.253 of 2000 on the file of District Munsif Court, Pollachi.

PRAYER IN C.R.P.PD.No.1726 of 2004 : Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 09.07.2004 in I.A.No.172 of 2004 in O.S.No.245 of 2000 on the file of District Munsif Court, Pollachi.

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For Petitioners : Mr.B.Ramamurthy
For Respondents : Ms.R.Revathy Government Advocate
for R1 & R2
Mr.Sivam Sivanandaraj
for R3

O R D E R

The plaintiff in both the suits are the revision petitioners and the revision filed under Article 227 of the Constitution of India. The order of the learned Trial Judge passed in Interlocutory Application in 173 of 2004 in O.S.No.253 of 2000 and I.A.No.172 of 2004 in O.S.No.245 of 2000 respectively filed under Order 6 Rule 17 Code of Civil Procedure to amend the plaints which was dismissed by the learned Trial Judge. In both the cases, the plaintiffs filed the suits for declaration and possession against the first and second defendants in the suit, namely, the District Collector, Coimbatore and Tahsildar Pollachi in respect of the natham land situated in Survey No.371/5 and 371/4 and for a consequential permanent injunction.

2. The case of the plaintiffs in both the suits is that admittedly, the said lands are natham purambokke lands and the husbands of the respective petitioners have been in occupation for nearly 40 years and putting up a thatched shed and were running a mutton stall and they have been paying B memo charges. After the death of the husbands in the case of C.R.P.No.1445 of 2004 and after the death of her father-in-law in the case of C.R.P.No.1726 of 2004, the plaintiffs have been occupying the property running mutton stalls and the defendants 1 and 2 have issued patta in the names of the plaintiffs. According to the plaintiffs, the third defendant, who was suspended Village Administrative Officer, has threatened to vacate the plaintiffs and at his instigation the Sub-Collector has called for the records based on which the second respondent is taking steps to evict the plaintiffs from the suit property.

3. In those circumstances, the above suit was filed. During the pendancy of the suit, the second defendant along with the said Village Administrative Officer has dispossed the plaintiffs forcibly and therefore an amendment petition was filed and the suit prayer for possession was also included. The said amendment itself was filed and subsequently, allowed as per the direction of this Court in the order dated 25.08.2000.

4. The second defendant in both the cases have filed the written statement in the suit in which, it is stated that the Sub-Collector, Pollachi has ordered cancellation of natham patta granted to the petitioners. However, there was no enquiry conducted by the Sub-Collector, Pollachi before canceling the said patta and no notice was given to the petitioners and even the alleged order of cancellation has not been served.

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5. The case of the petitioners is that after the trial has commenced and the plaintiffs were examined, during the examination of the defendant D.W.1 on 20.08.2003, the defendants 1 and 2 have produced the Xerox copy of the order dated 29.05.2000 passed by the Sub-Collector, Pollachi, canceling the natham patta.

6. According to the petitioners, since they came to know about the actual order only on 20.08.2003 at the time, when the D.W.1 was examined before the Trial Court, immediately they have filed I.A.No.173 of 2004 in O.S.No.253 of 2000 and I.A.No.174 of 2004 in O.S.No.245 of 2000 respectively, praying for an amendment of the plaint in order to include an additional prayer to declare the order passed by the Sub-Collector, Pollachi, dated 29.05.2000 as null and void. The defendants 1 and 2 in the suit have filed counter affidavit in the Interlocutory Applications saying that the plaintiffs were aware of the canceling orders of the Sub-Collector, Pollachi, dated 29.05.2000, canceling the natham patta even on the same day apart from stating that even in the written statement filed by the defendants 1 and 2 before the Trial Court, which was filed in September 2001 itself the facts of the said order of canceling the natham patta was mentioned and therefore according to defendants 1 and 2, the petitions filed in the year 2004 for the purpose of amendment of plaint, is not permissible.

7. It was considering the arguments of both the sides and finding that even while filing the written statement by the second defendant which was on 14.09.2001, it was specifically stated therein about the order of cancellation of natham patta dated 29.05.2000 and the petitioners plaintiffs having not taken any steps to amend the prayer even at that time immediately after filing of the written statement, have chosen to file the present petitions for amendment after the trial has begun and even after the examination of P.W.1 is completed and D.W.1 was to be examined.

8. The Trial Court has also found that since the Code of Civil Procedure as amended in 2002 does not permit filing of any amendment after the trial has commenced and also finding that the prayer will amount to resulting in new cause of action, has dismissed the petitions for amendment, against which the plaintiffs have filed the above revision petitions as stated above.

9. The learned counsel appearing for the petitioners in both the cases would submit that the order of the learned Judge that the proposed amendment by which the order of the Sub-Collector, Pollachi dated 29.05.2000, is sought to be declared as null and void, will create new cause of action is not correct. According to him in the original plaint of the plaintiffs itself it is stated that they have been in possession for more than 40 years, even though admitting that the property in possession is a natham porambokke but on the basis that they have been paying B memo charges and subsequently, natham patta has been granted in their favour. Therefore, according to the learned counsel for the

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petitioners if subsequently, such patta is cancelled, the prayer for cancellation of the patta in the suit for declaration and possession, should only be taken as consequential and cannot be said to be introducing a new cause of action.

10. The learned counsel for the petitioners also would submit that the amended Code of Civil Procedure, which came into force in 2002 by which a proviso has been introduced under Order 6 Rule 17, has no application on the facts and circumstances of the case, for, the suit is of the year 2000, which was instituted much before the amendment came into force. In any event, according to the learned counsel for the petitioners even assuming that the amended C.P.C. in respect of the facts of the case is applicable, the petitioners have made out and explained the proper reason for the delay. According to them even though it is true that in the written statement filed on 14.09.2001 which was much before the amendment of Code of Civil Procedure, the cancellation of patta was stated, inasmuch as the plaintiffs have never been given any notice of such cancellation and were not aware, it was for the first time on 20.08.2003 when the D.W.1 was to be examined as a witness, the Xerox copy of the said order was sought to be produced and it was only thereafter, the actual contents of the order of cancellation came to the knowledge of the petitioners and immediately they have filed the present petition in November 2003 itself for the purpose of amendment and therefore, even assuming that there is a delay, the same has been duly explained, which in fact has not been considered by the trial Judge.

11. On the other hand, it is the contention of the learned counsel appearing for the respondents 1 and 2 that when, as on today the Code of Civil Procedure as amended, has come into force even in 2002, the proviso to Order 6 Rule 17 does not enable any persons who file petition for amendment after the trial has commenced, especially on the facts and circumstances of the case that even the defendants witness is to be examined and the plaintiffs have not explained the reason for not filing such amendment from September 2001 till November 2003.

12. I have heard the learned counsel for the petitioners as well as the respondents and perused the records.

13. On fact in respect of both the cases it is clear that the petitioners were earlier conferred with a natham patta and the same was cancelled by the Sub-Collector, Pollachi, on 29.05.2000. While canceling such patta, whether the Sub-Collector, Pollachi has given notice to the petitioners or not, is not the subject matter, which can be gone into in this proceedings. But the point is to be considered is as to when the factum of such cancellation came to the knowledge of the plaintiffs / petitioners. It is admitted as it is seen in the written statement filed on behalf of the second defendant in the suit, which was filed as early as 14.09.2001 stating that the Sub-Collector, Pollachi has cancelled the patta even on 29.05.2000. It is seen that both the suits should have been filed before the alleged order of the Sub-Collector, Pollachi, dated

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29.05.2000, canceling the natham patta, as it is seen on record that the petitioners have filed in W.P.Nos.14399 and 14400 of 2000 before this Court, seeking for a mandamus to redeliver possession on the basis that pending suit, they have been dispossed and it was in those circumstances, by order dated 25.08.2000, this Court has directed the petitioners to approach the Civil Court wherein the suit has already been filed by the petitioners to seek necessary amendments of plaints and accordingly, amendments were filed and the relief for possession has been ordered. At the time of the institution of the suits in both the cases, the natham patta issued in favour of the petitioners were not cancelled. Consequently, it was at the time of filing of the written statement by the second defendants in September 2001, which is stated to be 14.09.2001 as seen in the impugned order of the learned Trial Judge, the second defendant has in fact mentioned about the order of cancellation dated 29.05.2000 of course with particulars of the order of the Sub-Collector, Pollachi. But in the affidavit filed in support of the petitions for amendment, the petitioners have categorically stated that the cancellation order has never been served on them. However, in the counter affidavit filed by the respondents 1 and 2 in Interlocutory Applications, it was never the case of the respondents that such orders of cancellation of natham patta have been served on the plaintiffs / petitioners.

14. It was only their case in the counter affidavit that the petitioners/plaintiffs were aware of the order, dated 29.05.2000, especially, after filing of the written statement in September 2001 on the specific stand of the plaintiffs that they came to know about the contents of the order only on 20.08.2003 during examination of D.W.1, when the Xerox copy of the said order was produced, which in fact is not denied in the counter affidavit, there is definitely some substance in the arguments advanced on behalf of the petitioners that they had no opportunity to file the amendment petition, till they came to know about the contents of such cancellation order, which was admittedly produced only at the time when the defendants witness was sought to be examined on 20.08.2003. The learned Trial Judge has lost sight of this situation while denying the application for amendment and has only outwardly to come to a conclusion that the written statement refers about such order of cancellation even on 14.09.2001 and till 2003 no steps have been taken for amendment and therefore, there is a delay. Now, turning to Order 6 Rule 17 of Code of Civil Procedure, after the amended Civil Procedure Code came into existence by Act 22 of 2002 which was effected from 01.07.2002. The said Order 6 Rule 17 stands as follows:

> "17. Amendment of pleadings.- The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence the party could not have raised

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the matter before the commencement of trial."

15. Before the said amendment the proviso was not available under Order 6 Rule 17 of C.P.C. As pointed out by the Hon'ble Apex Court in the judgement rendered in Rajeskumar Agarwal and others Vs. K.K.Modi and others reported in 2006(4) SCC 385, Order 6 Rule 17 contained two parts, in respect of which the first part is discretion of the court, since the word "may" is used and the second part is mandatory or imperative in nature, since the term "shall" is used and that is for the purpose of determining the real questions in controversy between the parties.

16. Ultimately, the Hon'ble Supreme Court has held as per the view taken by the Hon'ble Apex Court even earlier in B.K.Narayanapillai Vs. Parameswarapillai and another reported in 2000(1) SCC 712, that the cardinal test and consequent primary duty of the court is to decide as to whether the amendment is necessary to decide the real dispute between the parties. In fact the Hon'ble Apex Court has categorically held that the subsequent events must be taken to consideration to shorten the litigation and to preserve and safeguard the rights of both parties to subserve the ends of justice.

17. Further, while dealing with the effect of the amended provision of the Code of Civil Procedure in respect of Order 6 Rule 17 by inserting the proviso, which came into force as I have stated earlier on 01.07.2002, a Full Bench of this Court in the judgement rendered in Hi.Sheet Industries, a partnership firm, carrying on business at 61-D,D.V.Road, Ambur Town, Vellore District Vs. Litelon Limited, having its Office at No.68, Sipcot Industrial Complex, Hosur, Rep.by its Managing Partner reported in 2006(5) CTC 609 by relying upon the earlier decisions rendered in Rathinam @ Samuthiram Ammal Vs. Syed Abdul Rahim reported in 2005(3) CTC 321 and Radhakrishnan Vs. Pattu Ammal reported in 2006(5) CTC 396, has held in categoric terms that the proviso to Order 6 Rule 17 of the Code of Civil Procedure is not applicable, in respect of the suits/ pleadings instituted before the commencement of the amended code. The relevant passage of the Hon'ble Full Bench is as follows:

> "11.19. In the instant case, the suit is instituted in October, 1990. The amendments came into force with effect from 01.07.2002. Therefore, the proviso to Rule 17 of Order 6, C.P.C. is not applicable in the instant case, however, we clarify that those amendments under Act 22 of 2002 are applicable to the pleadings instituted with effect from 01.07.2002."

18. Applying the said decision in the present cases the suits in O.S.No.253 of 2000 and O.S.No.245 of 2000 having been instituted in the year 2000, the amended Code of Civil Procedure in respect of Order 6 Rule 17, especially relating to proviso, has no application to the facts and circumstances of the case. Consequently, the decision arrived by the learned Trial Judge in dismissing the applicants filed for amendment on the ground that after commencement of the Trial, the same is filed, is not maintainable and is liable to be set aside as unsustainable. Even on the

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merits of the case, as I have narrated above, the learned Judge has passed the order rejecting the petition without proper application of mind. Even if the amended Code of Civil Procedure is to be applied, the proviso to Order 6 Rule 17 imposes an obligation on the Trial Court to give finding as to the reason for the petitioners in not filing the amendment petition, even after the written statement is filed informing about the cancellation of natham patta, especially when it is admitted that such Xerox copy of such order was produced for the first time only when the D.W.1 was examined in September 2003.

19. In view of the same, the orders passed by the learned Trial Judge in I.A.No.173 of 2004 in O.S.No.253 of 2000 and in I.A.No.172 of 2004 in O.S.No.245 of 2000 respectively dated 9th July 2004 in rejecting the applications for amendment filed by the plaintiffs are set aside and C.R.P.No.1445 and 1726 of 2004 are allowed with a direction to the Trial court to permit the petitioners to amend the plaints and thereafter, complete the trial after giving opportunity to the defendants to file additional written statement and also frame additional issues if any and complete the trial expeditiously, in any event within a period of 6 months from the date of receipt of the copy of the order and report the same to this Court.

No Costs. Consequently, connected C.M.Ps. are closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
The District Munsif, Pollachi.

+ 1 CC to Mr. V.Sankaranarayan, Advocate SR NO 784

+ 2 CCs to Mr.B.Ramamoorthy, Advocate SR NO 768

C.R.P.PD.Nos.1445 & 1726 of 2004

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